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No. 84-1736

In the Supreme Court of the United States

OCTOBER TERM, 1985

MIGUEL HIJAR, SUPERINTENDENT, FEDERAL PRISON CAMP AT BORON, CALIFORNIA, PETITIONER

v.

JAMES ROBERT BURRUS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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We have demonstrated in the petition for a writ of certiorari that the court of appeals plainly erred in holding: (1) that the federal district court could entertain this suit for injunctive relief to prevent the federal warden from complying with Arizona's request for custody of respondent pursuant to the Interstate Agreement on Detainers (IAD) (see Pet. 10-19); and (2) that, on the merits, Arizona now is barred by the "anti-shuttling" provision of the IAD from trying respondent because the Superior Court ordered him returned to federal custody after it granted his motion to dismiss the indictment on state law speedy trial grounds (see Pet. 22-26). As we have further explained (Pet. 19-21, 22-23, 26-29), each of these holdings by the court of appeals conflicts with the decisions of other courts of appeals and state courts and threatens substantially to disrupt the cooperative administration of the IAD. Review by this Court therefore is plainly warranted.

Respondent makes essentially no effort to rebut our submission on these issues. The several points respondent asserts by way of confession and avoidance are not meritorious.

1. a. In attempting to defend the court of appeals' affirmance of the permanent injunction barring the federal warden from complying with Arizona's request for custody, respondent asserts (Mem. in Opp. 2) that the district court did not actually hold the Arizona indictment invalid under the IAD. In making this assertion, respondent apparently seeks to minimize the extent to which the holding of the courts below interferes with the criminal proceedings against respondent in Arizona. Respondent is wrong.

The district court quoted the anti-shuttling provision, Article III(d), which states that if trial is not had on an indictment prior to return of the prisoner to his original place of custody, the indictment " 'shall not be of any further force or effect' " (Pet. App. 23a). The court then held that respondent was entitled to the benefits of the IAD, and it accordingly ordered the warden not to transfer respondent for trial on the indictment or to give effect to the detainer based on that indictment (Pet. App. 23a-24a). The court of appeals quoted the same language in Article III(d) and concluded that Arizona had "forfeited its sole opportunity to prosecute [respondent]," and on this basis it affirmed the permanent injunction entered by the district court (Pet. App. 18a-20a). Thus, the opinions by the courts below clearly hold that the Arizona indictment is invalid under the IAD, and indeed a holding to that effect was a necessary predicate to the relief they granted. Compare *California* v. *Grace Brethren Church*, 457 U.S. 393, 405-407 (1982); *United States* v. *Clark*, 445 U.S. 23, 26 n.2 (1980).

In any event, however the court of appeals' holding may be characterized, that court unquestionably has countenanced a direct interference by the federal courts with the criminal prosecution in Arizona—an interference that even the court of appeals appeared to acknowledge (Pet. App. 13a-14a) is in tension with the principles of federalism, comity, and equitable discretion established by *Younger* v. *Harris*, 401 U.S. 37 (1971), and its progeny. Where, as here, the receiving state's request for custody meets the explicit requirements of the IAD—*i.e.*, where that request was approved and transmitted by the court in the receiving state that has jurisdiction of the indictment, and the 30-day period during which the governor of the sending state (here, the Attorney General of the United States) may interpose an objection has expired—the IAD provides that the receiving state "shall be entitled" to custody of the prisoner. Art. V(a). The prisoner does not thereby lose his right to challenge the validity of the indictment under the IAD. He simply must challenge the indictment in the courts of the receiving state (here, Arizona), as the text and structure of the IAD contemplate. See pages 4-5, *infra*.

Moreover, contrary to respondent's assertions (Mem. in Opp. 2, 3), the courts of the receiving state are not foreclosed from determining this question until after the prisoner has actually been retransferred from federal custody to state custody, allegedly in violation of the IAD. To the contrary, in this very case, respondent filed his motion to quash the writ of habeas corpus ad prosequendum and to dismiss the indictment in the Maricopa County Superior Court while he was still in federal custody, and indeed he continues to litigate the validity of the indictment under the IAD in the Arizona Court of Appeals even while he remains in federal custody. But if the Arizona Court of Appeals ultimately rejects respondent's IAD claims and remands the case for trial, the injunction affirmed by the court of appeals

in this case would remain as an obstacle to that prosecution, which respondent's collateral action in federal court already has unduly delayed.[1]

b. Respondent argues, however, that to require him to litigate his IAD objections to the Arizona prosecution in the Arizona courts would mean that "only the fox has jurisdiction to guard the chicken-coop" (Mem. in Opp. 2). Respondent betrays a wholly unjustified and regrettable lack of respect for the courts of Arizona and the 47 other states that are parties to the IAD. See *Carchman* v. *Nash*, No. 84-776 (July 2, 1985), slip op. 1. Those courts are bound both by the Supremacy Clause and by state law to enforce the IAD, and there is no basis to doubt that they will do so. Nor is there any occasion here to consider further the desirability as an abstract policy matter of vesting the courts of the receiving state with responsibility for determining

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[1]Respondent contends (Mem. in Opp. 2 n.2) that "there is apparently no charge pending [against him] in Arizona" because the Arizona Court of Appeals previously had indicated that the State's appeal to that court from Superior Court's dismissal of the indictment under the IAD would be moot if the Ninth Circuit's decision in this case became final. Respondent contends that because the Ninth Circuit did not stay its mandate and that mandate has issued, the Ninth Circuit's decision now is final.

By order dated July 8, 1985, the Arizona Court of Appeals in fact did dismiss the State's appeal on the ground respondent urges. However, on the State's motion for reconsideration, that court, by order dated August 20, 1985, reinstated the State's appeal and ordered the appeal to be held in abeyance once again (until October 8, 1985), pending the disposition of the petition for a writ of certiorari in this case. In its order reinstating the appeal, the Arizona Court of Appeals correctly recognized that under *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983), the issuance of the court of appeals' mandate does not affect the jurisdiction of this Court to review the court of appeals' judgment or its ability to reverse that judgment and order the permanent injunction vacated. Because the State's appeal challenging the Superior Court's dismissal of the indictment under the IAD is still pending in the Arizona Court of Appeals, this case clearly is not moot.

whether indictments pending before them are invalid under the speedy-trial or anti-shuttling provisions of the IAD. The IAD, which Congress has approved as an interstate compact and to which it has made the United States a party, expressly provides for the courts of the receiving state to adjudicate such questions. By contrast, it confers no such authority on the courts of the sending state (in this case, the federal district courts). See Arts. III(d), IV(e) and V(c); Pet. 14-15.[2] The Ninth Circuit failed to respect that deliberate choice by Congress and the legislatures of the other party states.[3]

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[2]Contrary to respondent's contention (Mem. in Opp. 3-4), there is no distinction between the speedy-trial and anti-shuttling provisions of the IAD with regard to whether the courts of the receiving state or those of the sending state should enforce their terms. The former provides that "the appropriate court of the jurisdiction where the indictment * * * has been pending shall enter an order dismissing the same with prejudice" (Art. V(c)), while the latter provide that the "court shall enter an order dismissing the [indictment] with prejudice" (Arts. III(d) and IV(e)). In both instances, the IAD contemplates a role only for the court of the receiving state before which the indictment is pending.

[3]Respondent's reliance (Mem. in Opp. 2-3) on Article IV(d) of the IAD and *Cuyler* v. *Adams*, 449 U.S. 433 (1981), in support of federal court intervention in a case such as this is without merit. As we have explained in the certiorari petition (at 15-16), this Court held in *Cuyler* v. *Adams* only that Article IV(d) preserves whatever right the prisoner has *outside* the IAD (*e.g.*, under the Uniform Criminal Extradition Act, which has not been adopted by the United States) to a limited judicial "hearing" prior to transfer. Neither *Cuyler* v. *Adams* nor Article IV(d) suggests that the IAD itself confers a right to bring an action in the courts of the sending state (or in federal court) to challenge the validity under the IAD of the indictment that is pending in the receiving state. To the contrary, *Cuyler* v. *Adams* recognizes that the only right the IAD affords the prisoner in the sending state is the right to petition its governor for relief. 449 U.S. at 444-447. This express authorization to seek relief from the executive in the sending state suggests the absence of a right to appeal to the judiciary in the sending state. Pet. 15.

2. Respondent mentions only in passing the court of appeals' ruling on the merits that Arizona is now barred by Article V(c) of the IAD from prosecuting him because the Superior Court ordered him returned to federal custody when it granted his motion to dismiss the indictment on state law speedy trial grounds. See Mem. in Opp. 4. Respondent makes no effort to square this holding with the text of the IAD or with its purpose to minimize the disruption of the prisoner's rehabilitation at his original place of confinement. Nor does respondent advert to his position in the Maricopa County Superior Court that "[i]t would have been the worst violation of Arizona's Agreement on Detainers to have held [him] in the Maricopa County Jail pending outcome of the appeal," because "he would have languished in the Maricopa County Jail for over 19 months" (E.R. 73; see Pet. 23).

Instead, long after respondent was returned to federal custody—without any objection on his part and as the direct consequence of his own motion to dismiss the indictment—respondent now asserts (Mem. in Opp. 4) that the State should have either (i) obtained a written waiver from him before returning him to federal custody, or (ii) expedited the appeal of the dismissal of the indictment. As we have explained in the certiorari petition (at 28), however, the courts of appeals consistently have held that a prisoner may be deemed to have waived the protections of the IAD (including its anti-shuttling provisions) by taking or requesting actions inconsistent with those protections, even in the absence of an express waiver.

As we also have explained in the petition (at 23 n.15), although the IAD imposes time limits on proceedings in the *trial* courts of the receiving state, it imposes no such limits on proceedings in the appellate courts. Nor does it silently impose a vague duty on the receiving state to "expedite" any appeal from the dismissal of an indictment, as respondent

urges. Furthermore, if respondent means to suggest that an appeal must be expedited to the extent necessary to permit the trial to be held within the 180-day or 120-day speedy-trial periods under Article III(a) or IV(c) of the IAD, it often would be impossible for the receiving state to meet those deadlines if they were not extended during the pendency of the appeal, especially if the trial court's dismissal of the indictment occurred toward the end of the relevant period. But as it happens, Article VI(a) in fact provides that the running of the speedy trial periods "shall be tolled whenever and for as long as the prisoner is unable to stand trial"—which necessarily includes the period during which any appeal from the dismissal of the indictment is pending in an appellate court, since a defendant cannot stand trial on charges that have been dismissed. There is no limitation on the duration of such tolling; it is to be "for as long as" the appeal remains pending under applicable appellate procedures, which the IAD did not purport to displace.

3. Finally, respondent baldly asserts (Mem. in Opp. 5) that there is no conflict among the circuits on the issues presented in the petition for a writ of certiorari. Respondent is simply wrong. The Ninth Circuit's holding in this case that respondent could bring an action in federal district court to challenge the validity of the Arizona indictment under the IAD and to prohibit the federal warden from transferring him to Arizona for trial on that indictment conflicts with the decisions of the Third and Tenth Circuits in *Mokone* v. *Fenton*, 710 F.2d 998, 1002-1003 (3d Cir. 1983), and *Campbell* v. *Virginia*, 453 F.2d 1230, 1231 (10th Cir. 1972), and with numerous state court decisions that have held that only the court of the state in which the criminal charges are pending has jurisdiction to entertain a challenge to the validity of those charges under the IAD. See Pet. 20. Similarly, the court of appeals' holding on the merits that Arizona now is prohibited by the IAD's anti-shuttling provision from trying respondent is inconsistent

with the decisions of a number of state and federal appellate courts that have held that a prisoner may be deemed to have waived the protections of the IAD by taking or requesting actions inconsistent with those protections (see Pet. 27-28). These conflicts warrant resolution by this Court.

CONCLUSION

For the foregoing reasons and the additional reasons stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted. Because respondent has failed to offer any substantial defense of the court of appeals' rulings in this case, we renew our suggestion that the Court consider summary reversal of the judgment below. If the Court follows that course and agrees with our threshold submission that the district court was without authority to entertain this suit for injunctive and declaratory relief against the federal warden, the Court should vacate the judgment of the court of appeals and remand with instructions to dismiss the complaint.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

SEPTEMBER 1985

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